1968

Carl A. Palombi v. D & C Builders : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL A. PALOMBI,
Plaintiff and Respondent,

vs.

D & C BUILDERS,
Defendant and Appellant.

Case No. 11284

BRIEF OF RESPONDENT

Appeal from the Judgment of the 2nd District Court for Weber County Honorable Parley E. Norseth, Judge

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STATEMENT OF NATURE OF CASE

Respondent accepts Appellant's statement.

DISPOSITION IN LOWER COURT

On October 24, 1966, plaintiff filed a complaint in the District Court of Weber County against defendant for damages to plaintiff's residence resulting from defendant's installation of aluminum siding to the exterior walls of said residence in an unworkmanlike,

unskillful and careless manner. The complaint also alleged that defendant's installation of said siding was stopped by order of Ogden City because defendant had willfully failed to obtain an Ogden City building permit. The final allegation of the complaint was an assertion that defendant had wrongfully caused a lien to be filed against the residence of plaintiff, thereby slandering plaintiff's title to his residence. The recovery sought was $1,000.00 in actual damages and $5,000.00 as exemplary damages.

An answer, counterclaim and third-party complaint, inter-pleading plaintiff's wife, VIOLA PALOMBI, were duly entered by defendant. The counterclaim sought recovery of the contract price, attorney fees and a foreclosure of defendant's purported lien. The four allegations of the counterclaim were (1) that there was a written contract between plaintiff and defendant, (2) that defendant had made full performance of said contract, (3) that none of the contract price had been paid by plaintiff, and (4) that defendant's lien had been filed "within eighty days of the furnishing of the last work or material." Written interrogatories were propounded by plaintiff and answered by defendant. The Honorable PARLEY E. NORSETH tried the case without a jury and entered judgment in favor of the plaintiff and against the defendant in the sum of $627.00 as general damages, $1,000.00 as exemplary damages, $250.00 as attorneys' fee and $42.00 as reimbursement for the costs of plaintiff.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the trial court decision.

STATEMENT OF FACTS

On or about April 23, 1966, two sales representatives of the Appellant called upon Respondent at his residence for the purpose of selling aluminum siding. Their solicitation or inducement for a contract included representations that Respondent's residence would be "a show house" to be shown on television, that a discount was possible and that the workmanship would be "A No. 1." (Tr. p. 4, lines 14-29 and p. 34, lines 11-14) A printed form contract, prepared by Appellant (Plaintiff's Exhibit A), was subsequently signed by Respondent and his wife.

Appellant's workmen commenced the application of the aluminum siding to Respondent's residence on April 26, 1966. (Tr. p. 14, lines 7-9 and p. 34, lines 25-28)

Respondent was very dissatisfied with the poor quality of Appellant's work and telephoned to Appellant's Salt Lake Office on April 25, May 2, and May 3, 1966, to communicate to Appellant his dissatisfaction with the workmanship. (Tr. p. 6, lines 8-26; p. 143, lines 3-16; Plaintiff's Exhibit O) Failing to get any response from Appellant, Respondent called the Ogden City Building Inspector, who issued a "Stop Work"

order against Appellant on May 6, 1966, for Appellant's failure to obtain an Ogden City building permit. (Tr. p. 7, lines 14-22 and Plaintiff's Exhibit B) On May 7, 1966, Respondent ordered Appellant's workmen off his premises and they complied by removing all of their materials, including firring strips and siding. (Tr. p. 105, lines 1-14; p. 7, lines 5-9; p. 22, lines 1-26; and p. 23, lines 4-21) No additional work was done at Respondent's residence by Appellant's workmen, nor were any additional materials delivered to said residence after Saturday, May 7, 1966; (Tr. p. 35, lines 1-17; p. 145, lines 3-30; p. 146, lines 1-7; and p. 152, lines 1-25) although Appellant requested permission of Respondent to finish the job on two or three occasions. (Tr. p. 18, lines 18-30; p. 21, lines 15-30; and p. 135, lines 16-24)

J. F. FERRIN, an aluminum siding contractor and RAY L. HANSEN, the Utah State Building Inspector and formerly an aluminum siding contractor testified to the substandard and poor workmanship inherent in Appellant's application of siding to Respondent's residence. (Tr. p. 43, lines 14-30; p. 44, lines 1-8; p. 48, lines 23-28; and p. 55-58) In the same testimony MR. HANSEN alluded to the unnecessary damage caused to Respondent's residence by Appellant's use of improper materials. CARLISLE BAWDEN an employee of Appellant, testified to part of the damage caused by Appellant's workmen. (Tr. p. 127, lines 8-16) The general damages were described most clearly by Respondent during his cross examination by Appel-

lant's counsel. (Tr. p. 18, lines 24-30; and p. 19, lines 1-11)

Appellant's office manager, DAVID A. NABOR, testified that he didn't obtain a building permit until May 24, 1966. (Tr. p. 132, lines 16-22) It should be noted that this building permit was not obtained until nearly one month after the actual work had commenced.

MR. NABOR's testimony and his answers to the interrogatories propounded by Respondent conflicted with the testimony of Respondent and MRS. PALOMBI; however, MR. NABOR did admit that his testimony was untrue in at least one instance. (Tr. p. 146, lines 1-25).

On August 10, 1966, Appellant caused a mechanic's lien to be filed against Respondent's residence. The filing date of said lien was ninety-six days after Appellant had furnished the last work and materials (May 6, 1966) and ninety-five days after Respondent had ordered Appellant's workmen off the premises (May 7, 196). (Tr. p. 105, lines 1-14; and p. 146, lines 5-7) It was averred in said lien that Appellant had done its last work on May 24, 1966, although the workman of Appellant testified that May 6, 1966, was the last day any work was performed. (Tr. p. 148, 3-13; and p. 14, lines 1-8)

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THE LIEN OF THE DEFENDANT AND APPELLANT TO BE INVALID.

The Respondent submits that a mechanic's lien recorded 95 days after the last work and material were furnished and also 95 days after the workmen had been ordered away from the premises by the owner is invalid under Section 38-1-7, Utah Code Annotated 1953.

Although the contract in the instant case was not completed by Appellant prior to the lien filed on August 10, 1966, it was definitely rejected and abandoned by Respondent at least 95 days prior to said filing. In fact Appellant's workman, CARLISLE BAWDEN testified that Respondent had ordered Appellant's workmen off the premises on May 7, 1966, with the following language:

> You fellows get off here right now. I don't want any more work done. If you don't get off I will call the law on you. (Tr. p. 105, lines 7-9

This absolute rejection of the contract and its performance by Appellant was reaffirmed at least once by Respondent prior to May 24, 1966, when he refused to permit MR. LYLE JENSEN, one of Appellant's workmen, to resume work. (Tr. p. 136, lines 1-15 and p. 155, lines 3-28) These assertions and acts of Respondent were the testimony of Appellant's own witnesses and render untenable the statement in Ap

pellant's Brief, page 5, that May 24, 1966, was the first time Appellant learned of Respondent's refusal "to permit the work to go on."

It is generally held that abandonment of a contract is equivalent to completion for purposes of filing a mechanic's lien, or construed as a constructive completion. Annot., 64 A.L.R. 276, 277 (1930); *Stark-Davis Co. v. Fellows,* 129 Or. 281, 277 P. 110, 64 A.L.R. 271 (1929). Many cases have supported the principle that mere cessation of labor will not of itself constitute an abandonment. See 64 A.L.R. 276, at 286, fn. 29.

These cases establishing the doctrine of abandonment as the equivalent of constructive completion enumerate the following elements of the doctrine: (1) cessation of work, (2) intention to abandon the contract, and (3) fair notice to potential lien claimants. Not only are all of these elements present in the instant case, but one additional element is present—an absolute rejection of the contract by the owner which rejection was communicated unequivocally to several representatives of Appellant, the only potential lien claimant. (Tr. p. 105, lines 7-9; and p. 155, lines 3-28)

In the instant case Appellant's office manager claimed that picking up the building permit on May 24, 1966, was "when the last bit of work was done for the home." (P. 148, lines 9-13 and 24-30) Also, it was implied that picking up the materials allegedly left at Respondent's residence on or after May 24, 1966,

was additional work extending the potential time f filing a mechanic's lien. (Tr. p. 154, lines 7-20) Neith the picking up of the building permit nor the alleg picking up of surplus materials from Respondent residence extended the statutory time for filing mechanic's lien. *District Heights Apartments v. N land Co.*, 202 Md. 43, 95 A.2d 90, 39 A.L.R. 2d 38 (1953); *Miller Lumber Co. v. Federal Home Develo ment*, 231 Wis. 509, 286 N.W. 58, 122 A.L.R. 7 (1939). The Maryland Court of Appeals in the *Di trict Heights Apartments* case stated the principle th way:

> [A lien claimant] cannot thereafter exten the time within which the lien may be filed b doing or furnishing small additional items an thereby fixing a date from which the period mus begin to run anew, especially where the doin or furnishing of such items is merely colorabl and the real intention is to save or restore right which is already imperiled or lost, or when the additional work is done or additional ma terials are furnished without the knowledge request or consent of the owner. *District Height Apartments v. Noland Co., Ibid.*

Under a Delaware statute a Delaware court ha held that the fact that a contract had not been full performed at the time of its wrongful termination b the owner who had received the labor and material would not validate a lien-claim filed more than th 90 days after the last labor was performed or the las materials were furnished. *Voigtman v. Wilmingto*

Trust Bldg., Corp., 7 Penn. (Del.) 265, 78 Atl. 920 (1908). The trial court in the instant case, however, was not dealing with a wrongful termination of contract by the owner but a rejection of a contract performance which, as it held, was "unworkmanlike, unskillful and careless" and which did in fact cause actual damage to Respondent's residence. (R. 24; Tr. p. 18, lines 24-30; p. 19, lines 1-11; p. 43, lines 14-30; p. 27, lines 8-16; p. 44, lines 1-8; p. 48, lines 23-28; and p. 55-58) Even Appellant's chief witness, DAVID A. NABOR, verified that Respondent's earliest complaint was "unworkmanlike" performance. (Tr. p. 156, lines 7-15)

Although there is some division among the authorities as to the exact time of abandonment, Respondent's absolute rejection of the contract and Appellant's unworkmanlike performance of said contract reasonably establish the time of abandonment as the date on which work ceased, the "Stop Work" order issued, and Respondent ordered Appellant's workmen off his premises. That day was May 7, 1966, not May 24, 1966. *Cf. Chicago Lumber Co. v. Merrimack River Sav. Bank,* 52 Kan. 410, 34 P. 1045 (1893).

The burden of demonstrating that a lien has been filed within the statutory 80-day period rests on the lien claimant, *Nagle v. Club Fontainbleau,* 17 Utah 2d 125, 405 P.2d 346 (1965), who must substantially comply with all requirements of the statute in the statement of his claim, and in all essential particulars such statement must be true. *Morrison, Merrill Co. v. Willard,*

17 Utah 306, 53 P. 832 (1898). If the claimant fai to file his lien within 80 days of the last substantial wo done on the premises, his claim of a lien is invali *Nagle v. Club Fontainbleau, Ibid.*

Appellant in the instant case failed to satisfy th Trial Court that its lien was filed timely. Its own wi nesses clearly established May 6 or 7, 1966, as the ve last day any "substantial" work was done on the "pre ises" of the Respondent. Consequently, a lien filed August 10, 1966, was either 95 or 96 days after a substantial work was done on Respondent's premise Equally fatal to the validity of Appellant's claim lien was the falsity of the claim itself which alleg that Appellant had furnished the "last labor and m terials on the 24th day of May, 1966." (R. 16) Th only thing accomplished by Appellant on said late da was the delinquent purchase of a building permit.

There was, therefore, no error committed by th Trial Court in finding that the Appellant's Notice lien filed August 10, 1966, was invalid and did wron fully misrepresent the date on which the last labor a materials were furnished by Appellant.

POINT II

THE DAMAGES FOUND BY THE TRIAL COURT AGAINST THE DEFENDANT AN APPELLANT ARE SUBSTANTIATED B THE EVIDENCE AND ARE NOT EXCES SIVE.

Under Section 38-1-18, Utah Code Annotated, 1953, the successful party in any action brought to enforce a mechanic's lien "shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in this action." Appellant's counterclaim (R. 5) was in fact an action to enforce or foreclose a mechanic's lien. Respondent, being the successful party in said action, was entitled therefore —as a matter of law—to a reasonable attorneys' fee. The original complaint of Respondent prayed for both costs of the action and "such other and further relief as to the court may seem proper in the premises." (R. 2) This statutory allowance of attorneys' fees to the successful party in such an action should extend to an appeal as well as the trial stage of the action.

Counsel for Appellant submitted to the Trial Court that the Utah State Bar Fee Schedule could be followed in assessing attorney fees. His submission was in the following language: "If there are attorney fees either way, we'll submit that the bar schedule is subject to Your Honor's inspection." (Tr. p. 158, lines 1-3) Counsel for Respondent joined in that submission. It should be noted that the $250.00 attorneys' fee awarded to Respondent is less than allowed under the Utah State Bar Fee Schedule for an action to foreclose a $3,290.00 lien.

The general damages in the sum of $627.00 were assessed as compensation to restore Respondent's residence to its condition prior to Appellant's breaking

the bricks all around Respondent's residence. Th damage was described at the trial by Respondent the Utah State Building Inspector and one of Appel lant's own workmen. (Tr. p. 8, lines 17-30; p. 9 an 10; p. 19, lines 1-8; p. 55-57; p. 69, lines 26-30; p. 7 lines 1-6; p. 127, lines 8-16; and Plaintiff's Exhib L and M) The Trial Court found that this damag was caused by the "unworkmanlike, unskillful an careless manner" in which Appellant's workmen at tempted to apply siding to Respondent's residence (R. 24) To this finding the Appellant has taken n exception.

Appellant did object to the admission of Plaintiff Exhibits L and M as being heresay. (Tr. p. 67, line 8-12) Respondent did, however, testify on cross exam nation that he was present when one bid (Exhibit M was handwritten and the other (Exhibit L) signed Apparently the Trial Court followed the detailed est mate of repair costs enumerated in Plaintiff's Exhib M (Tr. p. 68, lines 20-30) as a partial guide to th amount of compensation for the substantial damage to Respondent's residence. MR. J. F. FERRIN test fied, with no objection from Appellant, that he ha submitted a bid of $2,100.00 to re-cover the damage home of Respondent with wood grain siding includin the placing of firring strips only 16 inches apart an heavier backers behind the siding. (Tr. p. 41, line 2-30 and p. 42, lines 1-24)

It is submitted that the Trial Court had sufficien

competent evidence from the foregoing cited excerpts from the Transcript to assess the damages at only $627.00. The Trial Court also made judicial note of the fact that the bids had been submitted by "reputable individuals in town." (Tr. p. 68, lines 2-3)

In answer to Appellant's objection to the award of $1,000.00 as exemplary damages to Respondent-Plaintiff, the following factors in this case should be recalled:

1. Appellant induced Respondent to contract by promises of an "A No. 1" job to be shown on television. (Tr. p. 4, lines 25-30; and p. 34, lines 11-15)

2. The contract was a form prepared by Appellant and which by its printed terms unilaterally favored and protected the Appellant. (R. 18)

3. The work done by Appellant was unworkmanlike, unskillful and careless and caused great damage to Respondent's residence. (R. 24)

4. Appellant avoided official detection of this inferior workmanship by willfully failing and refusing to obtain a building permit with its attendant inspection requirements by qualified city inspectors. (Tr. p. 47, lines 13-19; p. 53, lines 24-30; and p. 54, line 1)

5. In spite of Respondent's repeated objections to the quality of Appellant's work (Tr. p. 6, lines 13-28 and p. 7, lines 15-19) Appellant's rep-

resentatives threatened to sue Respondent if the (Appellant's workmen) couldn't finish the wor (Tr. p. 35, lines 19-21)

6. Appellant filed a Notice of Lien against R spondent's residence on August 10, 1965, days after being ordered off the premises by t Respondent on May 7, 1966, and 96 days aft their work had been officially stopped by t Ogden City Building Inspector on May 6, 196

7. The purported lien of Appellant falsely stat that the Appellant "did furnish the last lab and materials on the 24th day of May, 1966 (R. 16)

8. The lien recording was published to commerci and professional establishments in the Ogd area by means of the "What's What" publicatio causing naturally great embarrassment to R spondent and his family. (Tr. p. 13, lines 18-2

Exemplary damages may be allowed as a punis ment to a defendant as a warning and example to de him and others from committing like offenses in t future. 22 Am. Jur. 2d *Damages* §237 (1965). Th court has held that for a defendant to become liable f exemplary damages he must know that his act is wron ful and do it intentionally without just cause or excus and if he acts in good faith, with honest belief that h act is lawful, he is not liable for such damages, thou mistaken as to legality of the act. *Calhoun v. Univers Credit Co.,* 106 Utah 166, 146 P.2d 284, 288 (194

And further, that the assessment of such damages must appear to have some basis in reason in relation to the wrongful act, the manner and intent with which it was done, the injury inflicted and th actual damage suffered. *Powers v. Taylor,* 14 Utah 2d 152, 379 P.2d 380, 383 (1963).

Appellant argues that there was no allegation of willful misconduct or malice on the part of defendant and that there was nothing in the evidence to show either. To the contrary, the complaint of Respondent-Plaintiff specifically prayed for $5,000.00 as exemplary damages and the foregoing eight factors supported by references to the Record and Transcript are replete with evidence of willful and wrongful misconduct committed intentionally without just cause or excuse. The contract in the instant case was solicited by means of a sales commission in the sum of $800.00, about which Appellant's office manager had a most difficult time telling the truth. (Tr. p. 146, lines 8-30 and p. 147, lines 1-20)

Although the contract itself provided in bold print a guaranty against faulty work or faulty materials, it proved in fact to be merely illusory and a thing about which Appelant refused discussion with Respondent. (Tr. p. 6, liens 12-19; p. 154, lines 24-30; p. 155; and p. 156, lines 1-15) It was Appellant's horirble workmanship that caused the severe damage to Respondent's residence, which was, incidentally, a finding of the Trial Court to which the Appellant has taken no exception.

CONCLUSION

It is submitted that the Trial Court committed error in finding the purported lien of the defenda to be invalid and that the damages, both general a exemplary, awarded to Respondent were reasona and supported by the evidence. As a matter of l Respondent was entitled to a reasonable attorneys' f as a direct consequence of Appellant's countercla to foreclose a mechanic's lien. The judgment of t Trial Court should be sustained and Respondent awa ed its costs.

Respectfully submitted,

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